

Deroover (Migration) [2017] AATA 757 (27 April 2017)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Miss Kristine Monica Johanna Deroover
CASE NUMBER:	1514432
DIBP REFERENCE(S):	BCC2014/2085593
MEMBER:	Margie Bourke
DATE:	27 April 2017
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa: • cl.820.211(2) and cl.820.221 of Schedule 2 to the Regulations; and • r.2.03A

Statement made on 27 April 2017 at 11:50am

CATCHWORDS

Migration – Partner (Temporary)(Class UK) visa – Subclass 820 (Partner (Temporary)) – De facto partner – Extensive evidence provided for existence of relationship – Genuine continuing relationship

1. LEGISLATION

Migration Act 1958, ss 5CB, 65

Migration Regulations 1994, Schedule 2, cl 820.211, r 1.09A, r 2.03A

CASES

Bretag v MILGEA [1991] FCA 582

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision of a delegate of the Minister for Immigration on 8 October 2015 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
3. The applicant applied for the visa on 24 August 2014 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2) because the delegate was not satisfied the applicant was the de facto partner of the sponsor at the time of application.
5. The applicant appeared before the Tribunal on 27 April 2017 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The main issue in the present case is whether the applicant is the de facto partner of the sponsor at the time of application.
8. SPOUSE/DE FACTO (cl.820.211(2)(a), cl.820.221)

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

9. Clause 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. Based on the sponsor's South Australian birth certificate the tribunal is satisfied that the sponsor is an Australian citizen by birth. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian citizen.

ARE THE PARTIES IN A DE FACTO RELATIONSHIP?

10. 'De facto partner' is defined in s.5CB of the Act and provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
11. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision.

12. The tribunal has applied the principles espoused in the decision of *Bretag v MILGEA* [1991] FCA 582, and has had regard the subsequent history of the relationship when determining issues at the time of application, so long as it tends logically to show the existence or nonexistence of facts relevant to the issue to be determined at the time of application.
13. The tribunal has considered the applicant's statement detailing the history of the relationship, and the statutory declarations provided by the sponsor's mother, sister in law and the partner of a long time friend of the sponsor. The tribunal has also considered the statement (an unsworn statutory declaration) of the applicant's mother. The tribunal has also considered the statutory declarations provided to the Department dated August 2014 from three people who had known the sponsor for a long time.
14. The tribunal has also considered the other evidence provided by the applicant, including numerous photographs, financial documents and utility bills, tax returns, evidence of communication between the parties and other cards and correspondence.
15. The written and oral evidence before the tribunal from family, friends and work colleagues of the applicant and the sponsor is that the parties met in June 2013 and worked together from that date. Further the consistent written and oral evidence before the tribunal is that the applicant and sponsor lived together from July 2013. The tribunal is satisfied that the parties lived together on shearing runs, and at the sponsor's family farm and other farming and fishing employment from July 2013. The tribunal is satisfied that the applicant and sponsor present themselves to their family, friends and work colleagues as being in a de facto relationship and as partners from July 2013.
16. The tribunal is satisfied that the applicant and sponsor had their own bank accounts but established a joint bank account in 2014. The tribunal is satisfied that the parties used the joint bank account for some shopping and sharing of daily expenses. The tribunal is satisfied that this joint bank account has evolved to be the bank account they use to pay a mortgage for a block of land purchased at Port Kenny. The tribunal is satisfied that the parties were together when they decided to purchase this block of land, and that they plan future to build a house on this block. The tribunal is satisfied that the applicant and sponsor have subsequently applied to transfer the block of land into joint names and have provided a memorandum of transfer.
17. The tribunal is satisfied that the applicant and sponsor have the use of one of three homes on the sponsor's family's farm at Warrambo, and they use this home as their base. The tribunal accepts the sponsor's brother and his family live in one of the other homes. The tribunal accepts the sponsor's parents lived in the other home at the time of application, but have since moved into the town of Wudinna. The tribunal is satisfied that the postal service to the farm at Warrambo, is via a post office box at the local post office, so the applicant's and sponsor's address is c/- a post office box. The tribunal is satisfied based on the evidence before it that the applicant and sponsor share the cooking, cleaning and washing domestic responsibilities between them whether they are at the home on the farm at Warrambo, or staying in huts while working on shearing runs or other farm employment. The tribunal is satisfied that the applicant undertakes any book keeping or computer work and the sponsor is responsible for any backyard mechanic repairs.
18. The tribunal has considered the evidence before it and is satisfied that the parties intend to continue to work together doing shearing, farming and fishing employment. The tribunal is satisfied that the parties intend to build a house on their block at Port Kenny. The tribunal is satisfied that the applicant intends to establish a health rehabilitation type business. The tribunal is satisfied that the parties support each other through difficult

times, including the sponsor's support of the applicant during the recent illness of her sister.

19. For the above reasons the tribunal makes the following findings. The evidence of the financial aspects of the relationship, includes evidence that the parties are jointly involved in the purchase of a block of land, that the parties share their daily living expenses and resources, and share decisions about investments, assets and business propositions. The evidence of the financial aspects of the relationship is evidence that the parties are in a genuine and continuing relationship at the time of application and at the time of decision.
20. The evidence of the nature of the household includes evidence that the parties share their lifestyle when at their home base at the farm at Warrambo, and when travelling and working together. The evidence of the nature of the household is evidence that the parties are in a genuine and continuing relationship, and that the parties live together, and not separately and apart, on a permanent basis, at both the time of application and at the time of decision.
21. The evidence of the social aspects of the relationship, includes evidence of statements and statutory declarations from family, friends and colleagues that the parties represent themselves as being in a de facto relationship with each other. It also includes evidence that the parties live and work together and undertake social activities as a couple. The evidence of the social aspects of the relationship is evidence that the parties are in a genuine and continuing relationship, and that the parties have a mutual commitment to a shared life to the exclusion of all others, both at the time of application and at the time of decision.
22. The evidence of the parties' commitment to each other is evidence of the parties have been in a relationship since July 2013, and that the parties view the relationship as long-term. The evidence of the parties commitment to each other includes evidence that the parties plan to build a house on the block of land they have purchased, and establish businesses together, and continue to live and work together. The evidence also includes the support the parties provide to each other, in particular the support the sponsor provided to the applicant recently during the time her sister was very sick. The evidence of the parties' commitment to each other is evidence that they are in a genuine and continuing relationship, and that the parties have a mutual commitment to a shared life to the exclusion of all others, and that the parties live together, and not separately and apart, on a permanent basis, at both the time of application and the time of decision.
23. The tribunal has considered the birth certificates of both the applicant and the sponsor, and is satisfied that the parties are not related by family.
24. For these reasons the tribunal is satisfied that the applicant is the de facto partner of the sponsor at the time of application and at the time of decision. On the basis of the above the tribunal is satisfied that the requirements of s.5CB(2) of the Act are met at the time of application and at the time of decision.
25. As the tribunal is satisfied that the applicant is the de facto partner of the sponsor at the time that application, the tribunal finds that the applicant meets cl.820.211(2)(a).
26. The tribunal has considered the application form which was lodged online on 24 August 2014 and the sponsorship form which was lodged online on 31 August 2014. The tribunal is satisfied that the applicant is sponsored by the applicant's de facto partner. Based on the sponsor's birth certificate the tribunal is satisfied that the applicant is

sponsored by her de facto partner who had turned 18 at the time of application. The tribunal is satisfied that the applicant meets the requirements of cl.820.211(2)(c).

27. There is no evidence before the tribunal that the applicant was not the holder of a substantive visa at the time of application and therefore the provisions of cl.820.211(2)(d) do not apply.
28. For the above reasons the tribunal finds that the applicant meets the requirements of cl.820.211(2) at the time of application.
29. The tribunal is satisfied that the applicant continues to meet the requirements of cl.820.211(2) at the time of decision, and as set out above the tribunal is satisfied the applicant continues to be the de facto partner of the sponsor at the time of decision. Therefore the tribunal finds that the applicant meets the requirements of cl.820.221.

ARE THE ADDITIONAL CRITERIA FOR A DE FACTO RELATIONSHIP MET?

30. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. These are: that the couple are both at least 18 years of age; and with limited exceptions, that the applicant has been in the de facto relationship for at least the period of 12 months ending immediately before the date of the application, unless he or she can establish compelling and compassionate circumstances for the grant of the visa. The requirement that the relationship existed for 12 months prior to the application does not apply in certain circumstances where the sponsor is or was a humanitarian visa holder, or for applications made on or after 9 November 2009, where the de facto relationship has been registered under a relevant State or Territory law: r.2.03(4), (5).
31. Based on the dates of birth recorded in both the applicant's and the sponsor's birth certificates the tribunal is satisfied that at the time of application both were at least 18 years old. For the reasons set out above the tribunal is satisfied that the applicant and sponsor have been in a de facto relationship since July 2013. Therefore the tribunal is satisfied that the relationship existed for at least 12 months before the visa application was made in August 2014.
32. For these reasons the Tribunal is satisfied that the applicant meets the additional criteria prescribed in r.2.03A.
33. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.
- 34.

DECISION

35. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
 - cl.820.211(2) and cl.820.221 of Schedule 2 to the Regulations; and
 - r.2.03A

Margie Bourke
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.09A DE FACTO PARTNER AND DE FACTO RELATIONSHIP

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits the regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).